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No. 96-123

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

NORTHROP CORPORATION AND MAX KILLINGSWORTH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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A. The False Claims Act (FCA or Act) provides that a *qui tam* action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." 31 U.S.C. 3730(b)(1). In our petition for a writ of certiorari, we explain (Pet. 11-18) why Section 3730(b)(1) is properly construed to permit the Attorney General to veto the voluntary dismissal, pursuant to settlement, of a *qui tam* suit brought under the Act. We further explain (Pet. 21-22) that the decision of the court of appeals to the contrary will substantially impair the Attorney General's ability to protect the public interest in the just resolution of suits involving fraud against the United States, and that review by this Court is therefore warranted even in the absence of a circuit conflict.

Respondent Northrop does not contest the substantiality of the public and governmental interests involved.

Rather, Northrop contends that (1) those interests will be sufficiently protected by a rule allowing the district court to determine the reasonableness of a proposed *qui tam* settlement (Br. in Opp. 13-15), (2) the manner in which the government litigated this case in the lower courts makes it an unsuitable vehicle in which to resolve the question presented (*id.* at 16-21), and (3) the court of appeals' construction of Section 3730(b)(1) is correct (Br. in Opp. 21-27). Those arguments are unpersuasive.

1. Northrop contends (Br. in Opp. 13) that the court of appeals' decision will affect the outcome only of cases in which the government objects to a *qui tam* settlement "mistakenly, unreasonably or arbitrarily, or for an improper purpose." The government does not, of course, assert an interest in arbitrarily vetoing settlements that are fair and reasonable. The point instead is that the Attorney General and the district court, each acting in good faith, may disagree as to the reasonableness of a given settlement. When such disagreements occur, the Attorney General's ability to safeguard the interests of the United States will be substantially impaired if she is compelled to accept a settlement that she concludes is not in the public interest.

The United States, it should be emphasized, is hardly a bystander to *qui tam* litigation. A *qui tam* action is predicated on allegations of fraud against the United States, and the suit is brought "for the person [the relator] and for the United States Government." 31 U.S.C. 3730(b)(1). The government receives the bulk of any monetary recovery. 31 U.S.C. 3730(d)(1) and (2). Perhaps most important, if a dismissal order in a *qui tam* case incorporates a settlement agreement, the dismissal will generally bar the government from filing a subsequent suit alleging claims falling within the scope of the settlement. See Pet. 13-14 & n.6. Indeed, the district court in the instant case ex-

pressly ordered that the settlement be affirmed and that the suit "be dismissed in its entirety with prejudice as to both Killingsworth and the United States." Pet. App. 9a. Thus, even where the government declines to intervene to take over the prosecution of a *qui tam* action, it retains the type of direct and substantial interest in the ultimate disposition of the suit that is usually confined to the parties to litigation.

It is well established that "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party * * * without that party's agreement." *Firefighters* v. *Cleveland*, 478 U.S. 501, 529 (1986). That principle applies even where the settlement receives the imprimatur of the district court. See *ibid.* There is consequently nothing anomalous about the rule that *qui tam* litigation cannot be settled without the approval of the Attorney General. Rather, that rule reflects Congress's recognition that even without formal intervention, the government's stake in the litigation is sufficiently like that of a party that the suit should not be settled without its consent.[1]

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[1] Under Section 3730(b)(1), voluntary dismissal of a *qui tam* action requires the consent of both the Attorney General and the district court. The requirement that the district court give its consent to a *qui tam* dismissal, Northrop points out, "must be understood as referring only to a conditional power to withhold consent for sufficient reason." Br. in Opp. 25. Northrop contends (*id.* at 25-26) that the Attorney General's authority should be similarly constrained. That analogy is misplaced. Where the approval of a district court is required to effectuate a settlement, the court's refusal to approve the agreement is, as Northrop contends, subject to appellate review. We are aware of no authority, however, suggesting that a *litigant's* refusal to agree to a settlement may be overturned by a court. Cf. *Evans* v. *Jeff D.*, 475 U.S. 717, 726 (1986) ("[T]he power to approve or reject a settlement negotiated by the parties * * * does not authorize the court to require the parties to accept a settlement to which they have not agreed.").

2. Northrop also contends (Br. in Opp. 16) that this case is a "poor vehicle" for resolving the first question presented because "the government's inability to block the settlement in the lower courts was directly attributable to its own failure to substantiate its objections." Northrop argues (*id.* at 16-21) that the government failed promptly to investigate allegations of fraud or to seek leave to intervene in the lawsuit.

As we explain in Part B, *infra*, Northrop's allegations of dilatory behavior on the part of government counsel are unfounded. Even if Northrop's characterization of the record below were correct, however, it would have no bearing on the suitability of this case as a vehicle for determining the scope of the Attorney General's authority under Section 3730(b)(1). Northrop does not deny that the Attorney General asserted in a timely fashion her right to veto the proposed settlement. Nor does Northrop deny that acceptance of the government's construction of Section 3730(b)(1) would require reversal of the court of appeals' judgment. The thrust of Northrop's argument is that the government might have attained its objectives by alternative means, and thereby obviated the need to resolve the scope of the Attorney General's authority under Section 3730(b)(1). That contention is simply irrelevant: whatever alternative courses the Attorney General might have pursued, the question whether she was entitled to veto the proposed settlement and dismissal is squarely and cleanly presented in this case.[2]

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[2] Northrop's argument is, moreover, substantially circular. Northrop asserts, for example, that

> [y]et another illustration of the government's mishandling of this case in the courts below is its conduct with respect to intervention. In 1992, the government could have avoided the issue presented here simply by filing a motion to intervene: as a party-litigant,

The position of the United States is that it need not persuade the district court that its objections to a proposed *qui tam* settlement are well-founded. Northrop argues to the contrary. But the allegation that the government "fail[ed] to substantiate its objections" to the settlement (Br. in Opp. 16) is simply irrelevant to the question whether the government is required to substantiate its objections in the first place.

3. Northrop's principal argument on the merits (see Br. in Opp. 22) is that the government's attempt to object to a *qui tam* settlement is a form of "intervention" and therefore requires a showing of "good cause." See 31 U.S.C. 3730(c)(3) (after the initial 60-day period plus any extensions of time have expired, the district court may "permit the Government to intervene at a later date upon a showing of good cause"). As we explain in the petition, however, the government's authority to veto the voluntary dismissal of a *qui tam* action substantially predates the

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the government then would have had absolute control over any settlement.

Br. in Opp. 19-20. Whether the failure to intervene constitutes "mishandling" of the case, however, depends on whether Section 3730(b)(1) authorizes the Attorney General to veto a proposed settlement without assuming the substantial burdens (such as increased discovery obligations, attendance at hearings and conferences, and the filing of additional pleadings) that intervention would entail. See Pet. 22. The government's position, after all, is that the Attorney General need *not* intervene in order to prevent the relator and defendant from executing a settlement that disserves the public interest. If our interpretation of Section 3730(b)(1) is correct, then intervention would have been a wasteful and unduly cumbersome means of preventing effectuation of the settlement in this case. Northrop is of course entitled to assert the contrary view; but the fact that the government litigated the case in a manner consistent with its own understanding of the Act hardly renders this case an unsuitable vehicle for resolution of the question presented.

statutory provisions permitting intervention by the government. See Pet. 15.[3] There is consequently no basis for Northrop's contention that the Attorney General's power to block dismissal of a *qui tam* action is subject to the "good cause" requirement of Section 3730(c)(3).

We acknowledge in our certiorari petition that "[w]here a court dismisses a *qui tam* action on the merits, * * * Congress did not intend to require the Attorney General's consent." Pet. 18 n.7. Northrop contends (Br. in Opp. 21) that "this concession is fatal to the government's position," because it demonstrates that strict fidelity to the language of Section 3730(b)(1) is not feasible in the full range of cases falling within its literal coverage. No

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[3] As the court of appeals acknowledged, "[t]he language in the statute requiring both the government and the court to consent to a dismissal came from the initial *qui tam* statute of 1863." Pet. App. 23a; see Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. The False Claims Act was amended in 1943 to permit intervention by the government within the 60-day period after a *qui tam* suit is filed. See Act of Dec. 23, 1943, ch. 377, 57 Stat. 608. Section 3730(c)(3), which permits intervention by the government after the initial 60-day period upon a showing of good cause, was added to the Act in 1986. Act of Oct. 27, 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3156.

Prior to the 1982 recodification of the FCA, the Act provided that a *qui tam* suit "shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth their reasons for such consent." 31 U.S.C. 232(B) (1976). Northrop contends that the earlier language "clearly suggests that § 3730(b)(1) applies only to cases in which a *qui tam* plaintiff sought to withdraw an action before the United States had an opportunity to assess its merits or intervene in its conduct." Br. in Opp. 24 (internal quotation marks, italics, and brackets omitted). We see nothing in the text of former Section 232(B) that would suggest such a temporal limitation. As noted above, moreover, the provision requiring the government's consent to the "withdraw[al]" or "discontinu[ance]" of a *qui tam* action was enacted well before the government was first permitted to intervene in such a suit.

canon of construction suggests, however, that the plain language of a statutory provision should be ignored altogether simply because its application in a particular instance would be unworkable. To require the consent of the Attorney General to a merits dismissal of a *qui tam* suit would be absurd. It would likely be unconstitutional as well, since such a provision would authorize the Attorney General to perform what is in substance a judicial act. To require the Attorney General's consent to the settlement and voluntary dismissal of such an action, by contrast, is constitutionally unproblematic, and it is fully consistent with the established rule that a litigant's claims may not be settled without the litigant's consent. See pages 2-3, *supra*. There is therefore no justification for departing from the plain language of the Act when applying Section 3730(b)(1) to voluntary dismissals.[4]

B. After the court of appeals' remand in *Killingsworth I*, Northrop moved to reaffirm the settlement. The government filed a written opposition to Northrop's motion. At the hearing on that motion, government counsel informed the district court that the government wished to intervene to take over the conduct of the litigation. See 94-56599 C.A. E.R. 80-81, 83-84, 88. Counsel explained that the government had recently obtained what

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[4] As noted above (see note 3, *supra*), prior to its 1982 recodification the FCA provided that a *qui tam* suit "shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth their reasons for such consent." 31 U.S.C. 232(B) (1976). The words "withdrawn" and "discontinued" would cover voluntary dismissal pursuant to settlement, but would not encompass dismissal by the district court after an adjudication on the merits. As Northrop acknowledges (see Br. in Opp. 24 & n.18), the wording changes made in the 1982 recodification were not intended to change the meaning of the relevant provision.

it believed to be evidence of fraud substantially greater than had originally been supposed, and he contended that the new evidence furnished "good cause under the statute to intervene" after expiration of the initial 60-day period. *Id.* at 84; see 31 U.S.C. 3730(c)(3). The district court stated that it would first determine whether the government had established good cause for objecting to the settlement, and that the propriety of intervention would become an issue only if the government's objections to the settlement were found to have merit. 94-56599 C.A. E.R. 84. The court ultimately reaffirmed the settlement over the government's objection. Both in its remarks at the hearing and in its subsequent written order, the court made clear that it deemed the presence or absence of new evidence to be irrelevant. The pertinent inquiry, in the court's view, was whether the settlement was fair and reasonable in light of the evidence that was available to the parties at the time it was negotiated. See *id.* at 90-91; Pet. App. 8a.

Thus, contrary to Northrop's suggestion (see Br. in Opp. 27-29), the district court's refusal to consider the government's intervention request had nothing whatever to do with the timing of the government's written motion to intervene.[5] Rather, the court concluded that (1) the propriety of intervention would become an issue only if the settlement were deemed unreasonable, and (2) in determining the reasonableness of the settlement, any evidence that was not available at the time the agreement was originally negotiated should be ignored. The court of appeals approved that reasoning, explaining that the man-

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[5] That motion was submitted to the district court on August 24, 1994—two days after the hearing on Northrop's motion to reaffirm the settlement, and approximately two weeks before the court issued its written order granting that motion. See Pet. App. 5a.

date in *Killingsworth I* "merely required the district court to hold a hearing on whether the government's objections to the proposed settlement rested on good cause —i.e., whether Killingsworth and Northrop colluded to shift the majority of the settlement funds to Killingsworth's personal claim and attorney's fees—thereby depriving the government of its fair share." Pet. App. 5a. The court of appeals stated that "[t]he district court did not err by refusing to consider the alleged new evidence relating to other issues before determining whether the government had good cause for objecting to the proposed settlement." *Id.* at 6a.[6]

As we explain in the petition (see Pet. 19), that holding is fundamentally flawed. The discovery of new evidence of fraud is the paradigmatic "good cause" for intervention by the government, pursuant to 31 U.S.C. 3730(c)(3), after expiration of the initial 60-day period. See S. Rep. No. 345, 99th Cong., 2d Sess. 26-27 (1986). Indeed, Northrop makes no effort to argue that a timely request for intervention could properly be denied without consideration of newly discovered evidence. It contends instead that the issue was not properly presented to the lower courts because

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[6] There is also no basis for Northrop's suggestion (Pet. 19) that the lower courts' disposition of this case was affected by the government's failure actually to present the new documentary evidence to the district court. The government made what was in essence an offer of proof, representing to the district court that the new documents furnished evidence of substantially greater fraud than had previously been alleged. The district court made clear, however, that it had no interest in considering those documents: it regarded the evidence as irrelevant because it had not been available at the time the settlement was originally negotiated. See 94-56599 C.A. E.R. 90-91; Pet. App. 8a. The court of appeals approved that reasoning, stating that "[t]he district court did not err by refusing to consider the alleged new evidence." *Id.* at 6a.

the government failed to submit a written motion for intervention before the hearing on Northrop's motion to reaffirm the settlement.[7] The record makes clear, however, that the absence of such a written motion played no part in the district court's decision.

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[7] Relying on the court of appeals' assertion that "Killingsworth provided copies of the new documents to an Assistant United States Attorney in 1993" (Pet. App. 3a), Northrop also suggests (Br. in Opp. 17-18) that the pertinent evidence was not in fact new. Issues concerning the timing and circumstances of the government's receipt of the evidence, however, have nothing to do with the basis on which the district court resolved the case. The court did not suggest that the government had failed to exercise due diligence in investigating allegations of additional fraud; it held that the evidence was irrelevant because it postdated the negotiation of the settlement. See pages 7-9 and note 6, *supra*.

The court of appeals' statement quoted above, moreover, has no support in the record. In our brief in the court of appeals, we stated that "Killingsworth initially showed the new documents to an Assistant United States Attorney in 1993, but did not at that time provide copies to anyone within the Department of Justice." 94-56599 U.S. C.A. Br. 11. Our reply brief explained that government attorneys "merely had a brief look at the documents with no opportunity to engage in a careful analysis of them, much less to consult with FBI investigators and other witnesses to determine their importance." 94-56599 U.S. C.A. Reply Br. 9. Nothing in the record before the district court or the court of appeals suggested that the government had been provided with copies of the relevant documents in 1993.

Northrop criticizes (Br. in Opp. 9-10 n.7, 17-18) our representation (see Pet. 8 n.3, 20 n.8) that the Assistant United States Attorney has informed us that he did not see the documents in question until July 1994. The government may well be bound by its earlier representations to the court of appeals. We assuredly are not bound, however, by the court of appeals' assertion that the government received *copies* of the documents at that time—a statement that is entirely devoid of record support. And there is nothing "improper" (Br. in Opp. 17) about apprising this Court of information in conflict with the government's prior representations.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

OCTOBER 1996